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Paper No. 9

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OFFICE OF PETITIONS

In re Patent No. 6,635,309
Issued: October 21, 2003
Application No.: 09/803,218
Filing Date: March 12, 2001
Attorney Docket No. **RDP001U**

:
: DECISION ON PETITION
: UNDER 37 CFR 1.378(c) AND
: REQUEST FOR INFORMATION
:

This is a decision on the petition, filed February 1, 2011, to reinstate the above-cited patent pursuant to 37 CFR 1.378(c). This is also a request for information in response to the petition under 37 CFR 1.378(b), filed February 1, 2011, to reinstate the above-cited patent.

The petition under 37 CFR 1.378(c) is **DISMISSED**.

The above-identified patent issued on October 21, 2003. Therefore, the grace period in 35 U.S.C. § 41(b) for paying the 3.5-year maintenance fee expired at midnight on October 21, 2007.

A petition to accept the unintentionally delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(c) must be filed with twenty-four months after the expiration of the six month grace period provided in 37 CFR 1.362(e) and be accompanied by: (1) a statement that the delay was unintentional; (2) payment of the appropriate maintenance fee, unless previously submitted; (3) payment of the surcharge set forth in 37 CFR 1.20(i)(2). The petition was not filed within the twenty-four month period following the expiration of the patent. This period expired at midnight on October 21, 2009. The twenty-four month period for filing a petition under 37 CFR 1.378(c) is a statutory requirement and cannot be waived or suspended.

The petition is dismissed, accordingly.

The amount of \$1,640.00 that petitioner paid for the surcharge for the petition under 37 CFR 1.378(c) will be refunded, in due course.

Petitioner will also be refunded \$490.00 because the 3.5 year maintenance fee for a small entity (as petitioner declares he is) is \$490.00, not 980.00. The overpayment of \$490.00 will be refunded, accordingly.

REQUEST FOR INFORMATION

This is a request for information in response to the petition under 37 CFR 1.378(b), filed February 1, 2011, to reinstate the above-cited patent.

Petitioner is allowed a non-extendable period for reply of **TWO (2) MONTHS** from the mailing date of this communication to provide a response. The response should be titled, "Response to Request for Information." If no response is provided within the period set forth, a decision will be made solely on the merits as set forth in the petition under 37 CFR 1.378(b) filed February 1 2011. No additional fees are due.

Petitioner is required to address the following points:

- A successful petition under 37 CFR 1.378(b) must affirmatively identify the cause of the delay in paying the maintenance fee and provide a statement from every person with first-hand knowledge of the circumstances surrounding the delay in paying the maintenance fee. It appears that petitioner is asserting that the Mr. Pollack was solely responsible for tracking and paying the maintenance fee and that Mr. Pollack's health prevented him from timely paying the maintenance fee. This is merely an inference, however. Petitioner must affirmatively state who was responsible for tracking and paying the maintenance fee. Petitioner must provide statements from any person who may have been charged with paying the maintenance fee and statements from any person with first-hand knowledge of the circumstances surrounding the failure to pay the maintenance fees.
- It is noted that petitioner states that petitioner discovered the patent was expired in 2009. Yet, the patent expired in October 2007. A grantable petition under 37 CFR 1.378(b) requires that petition establish that the entire delay—from the date the patent expired until the filing of a grantable petition—was unavoidable. Petitioner has not made any argument as to the period of delay between October 2007 and 2009. 37 CFR 1.378(b)(3) sets forth that a petition submitted under this portion of the Code of Federal Regulations must include a showing which is described as follows:

A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

Petitioner must, therefore, describe the steps that were in place to ensure that the maintenance fee was timely paid. This showing would include an explanation of who was responsible for paying tracking and paying the maintenance fee and the method this person, or entity, used for tracking the maintenance fee.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patent
Mail Stop Petitions
Box 1450
Alexandria, VA 22313-1460

By facsimile: (571) 273-8300
Attn: Office of Petitions

A courtesy copy of this decision is being mailed to the address cited on the petition.

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3222.

/Kenya A. McLaughlin/

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cc:

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